No. [illegible]

United States Circuit Court of Appeals

For the Ninth Circuit

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Appellant,

vs.

[illegible] LIPP,

Appellee.

Appellant's Petition and Brief

Appeal from the District Court of the United States for the District of Oregon.

[illegible]

Attorneys for Appellant.

[illegible]

Attorneys for Appellee.

FILED

AUG [illegible]

PAUL P. O'BRIEN,

Clerk

No. 5478

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Appellant,

vs.

BERTHA E. LIPP,
Appellee.

Appellant's Petition and Brief

To the Honorable the Judges of the Above Entitled Court:

The petition of the above named appellant respectfully recites:

(1) That this is an action brought on a policy of life insurance issued by appellant on the life of John A. Lipp. The policy is attached to the com-

plaint and is printed in full in the transcript of record, pages 7-31. The only substantial question at issue between the parties to the litigation is whether or not the insured John A. Lipp is dead.

(2) The District Court held that appellant was concluded on this subject by the judgment of the Circuit Court of the State of Oregon for Coos County in an action brought on another life insurance policy issued by appellant on the life of the said John A. Lipp. The record of this former judgment was admitted over the objection and exception of appellant as will appear from page 53 of the transcript of record. The evidence offered by appellant to show that John A. Lipp was still living was excluded by the court and an exception was reserved by appellant to the ruling of the court sustaining appellee's objection and excluding the said testimony. (Transcript of Record, 54-65.) The District Court thereupon instructed the jury as follows:

> "I will say, in the first instance, that as to the death of the deceased, that matter was formerly litigated between these parties, in an action commenced in Coos County, Oregon. In that action there was an issue raised upon the question as to whether the deceased, Lipp, died on the 31st day of January, 1924. That issue was determined in favor of the plaintiff, and, so far as this case is concerned, it is conclusive upon the parties to this action. So you will assume that the deceased died on that date, as set forth in the complaint."

(3) That appellant appealed from the judgment of the Circuit Court of the State of Oregon for Coos County. The said appeal was perfected, was duly heard by the Supreme Court of the State of Oregon, and on the 22nd of May, 1928, the Supreme Court of the State of Oregon handed down an opinion reversing the judgment of the Circuit Court for Coos County. That a copy of the opinion so handed down is hereto annexed, marked Exhibit "A" and made a part of this petition. The said opinion of the Supreme Court of Oregon is reported in 267 Pacific at page 519, and is found in the Advance Sheets of the Pacific Reporter bearing date June 25th, 1928.

(4) That subsequent thereto the mandate of the Supreme Court of the State of Oregon was duly entered in the journal of the Circuit Court for Coos County and a copy of the said order admitting the said mandate is hereto annexed marked Exhibit "B" and made a part of this petition.

(5) Appellant therefore avers that the sole foundation upon which the judgment rendered in the District Court of the United States for the District of Oregon in favor of appellee and against appellant on the 2nd of March, 1928, and from which this appellant has appealed, has been overturned and rendered of no force and effect.

WHEREFORE appellant prays that this court reverse the said judgment as of course.

ARGUMENT

The question of law presented by the foregoing petition has been before the Federal courts for consideration on several occasions.

Butler vs. Eaton, 141 U. S. 240; 35 L. Ed. 713, 714.

This was a decision rendered by Mr. Justice Bradley on a writ of error sued out to review the judgment of the Circuit Court of the United States for the District of Massachusetts. We quote from the opinion:

> "As the sole ground and reason for giving judgment against the receiver, in regard to the amount of the new shares of stock, was the judgment of the Supreme Judicial Court of Massachusetts, which (as stated) we have just reversed, the inquiry arises, What disposition may be made of the judgment in this case, supposing that the evidence of the Massachusetts judgment was properly admitted and allowed by the circuit court on the trial of the cause? At that time this judgment was valid and subsisting. It was not nominally between the same parties, it is true. It was a judgment recovered by Mary J. Eaton against the Pacific National Bank; whereas the present action is an action between Butler, the receiver of the said bank, and the said Mary J. Eaton. We are inclined to think, however, that the court below was right in determining that the two actions were substantially between the same parties, inasmuch as a receiver of a national bank, in all actions and suits growing out of the transactions of the bank, represents it as fully as an executor represents his testator. We think, therefore, that the evi-

dence of the judgment recovered was properly admitted as a bar to the receiver's title to recover in reference to the new stock. And it cannot be said, therefore, looking to the record in this case alone, that there is error in the judgment now before us. But by our own judgment just rendered in the other case, the whole basis and foundation of the defense in the present case, namely, the judgment of the Supreme Judicial Court of Massachusetts, is subverted and rendered null and void for the purpose of any such defense. Whilst in force, an execution issued upon it, and a sale of property under such execution would have been effective. And when it was given in evidence in this case it was effective for the purpose of a defense, but its effectiveness in that regard is now entirely annulled. Are we then bound to affirm the judgment and send it back for ulterior proceedings in the court below, or may we, having the judgment before us, and under our control for affirmance, reversal or modification, and having judicial knowledge of the total present insufficiency of the ground which supports it, set it aside as devoid of any legal basis, and give such judgment in the case as would and ought to be rendered upon a writ of error *coram vobis, audita querela,* or other proper proceedings for revoking a judgment which has become invalid from some extraneous matter?"

The court then proceeds to discuss the case of *Ballard vs. Searls,* 130 U. S. 50, 32 L. Ed. 846. The court concludes his opinion with the following language:

> "The present case is a more simple one. The judgment complained of is based directly upon the judgment of the Supreme Judicial Court of Massachusetts, which we have just reversed. It is apparent from an inspection of the record that the whole foundation of that part of the judgment which is in favor of the defendant is, to our judicial knowledge, without any validity, force or effect, and ought never to have existed. Why, then, should we not reverse the judgment which we know of record has become erroneous, and save the parties the delay and expense of taking ulterior proceedings in the court below to effect the same object?
>
> "Upon full consideration of the matter we have come to the conclusion that we may dispose of the case here. We therefore reverse the judgment of the Circuit Court, and order that the cause be remanded with directions to enter judgment for the plaintiff in error against the defendant in error for the whole amount sued for in the action, namely, eight thousand dollars, with interest and costs, and take such further proceedings as may be proper in conformity with this opinion."

The same question came before this court in the case of

Hennessy vs. Tacoma Smelting & Refining Co., 129 Fed. 40, 43-44.

The court speaking through Judge Gilbert said:

"One of the assignments of error is that the court held that the judgment of the state court in case No. 19,209 operated as a bar or as an adjudication of any of the matters involved in the present case. We need not enter into a consideration of the disputed questions involved on this assignment, further than to advert to the fact that, subsequent to the final decree rendered by the court below, the judgment so relied upon as an estoppel was reversed by the Supreme Court of the state of Washington. * * * *Hennessy vs. Tacoma S. & R. Co.,* 74 Pac. 584. It was held that the judgment of the superior court had been prematurely entered, and it was adjudged that the judgment be reversed, and the cause remanded to the superior court, with instructions to proceed with the trial on the issues joined. It has been held that the effect of a reversal of a judgment completely destroys its efficacy as an estoppel, and that an appellate court may take judicial notice on the appeal of such a reversal occurring after the date of the decision appealed from. *Butler vs. Eaton,* 141 U. S. 240, 11 Sup. Ct. 985, 35 L. Ed. 713. In that case the Supreme Court had before it for review on writ of error the judgment of the Circuit Court for the District of Massachusetts, in which it had been adjudged that a certain prior judgment of the Supreme Judicial Court of Massachusetts constituted an estoppel as to a portion of the amount sued for. After the date of the judgment

of the Circuit Court the decision of the Supreme Judicial Court of Massachusetts was, upon writ of error from the Supreme Court of the United States, reversed. The latter court, in deciding the case of Butler vs. Eaton, took judicial notice of that reversal, and said that, when the judgment so relied upon as an estoppel 'was given in evidence in this case, it was effective for the purpose of a defense, but its effectiveness in that regard is now entirely annulled. * * * The court therefore reversed the judgment of the Circuit Court, and remanded the cause, with directions to enter judgment for the plaintiff in error for the whole amount sued for in the action. On the authority of that case, we entertain no doubt that the decree of the lower court in the present case must be reversed."

The Circuit Court of Appeals for the Eighth Circuit has reached the same conclusion.

Ransom vs. City of Pierre, 101 Fed. 665, 670, 672.

"Assuming, in view of what has already been said, that the judgment in the mandamus suit was pleadable in bar, and determinative of the plaintiff's rights in the case now in hand so long as that judgment was unreversed, we are nevertheless confronted with the inquiry whether it should be given that effect when it is shown by a duly-certified copy of the opinion of the supreme court of South Dakota that the judgment in question has been vacated and annulled for error. As a general proposition, it is doubtless true that an appellate court is required to determine whether a judgment which is challenged by a writ of error is erroneous upon the facts disclosed by the record, and upon the facts as

they existed when the judgment was rendered. But, inasmuch as all rules of procedure are intended to secure the administration of justice in an orderly manner, it does not seem reasonable that a rule of procedure should be observed when it is apparent that a strict adherence thereto will work injustice. When an appellate court has the power to vacate a judgment rendered by a *nisi prius* court, over whose proceedings it exercises supervision and control, and its attention is called in an authentic manner to something that has transpired since the trial, which renders it inequitable to permit the judgment to be carried into effect, we think that it may lawfully exercise its power to annul the judgment and remit the record to the lower court for such further proceedings as may be necessary. It is essential, of course, that there should be a general observance of rules of procedure, but compliance with a particular rule ought not to be required when a literal compliance therewith would defeat, rather than promote, the ends of justice. As a general proposition, the rights of the parties to a suit are to be determined upon the facts as they exist when the action is commenced, or at least when the issues have been formulated by pleadings. Nevertheless, the common law has always permitted a defendant to take advantage of a defense growing out of what subsequently transpires by a plea *puis darrein* continuance. Andrews, Steph. Pl., Sec. 77; Chit. Pl. (16th Am. Ed.), pp. 689, 690. In the state of New York, where the doctrine prevails that the taking of an appeal from a judgment does not prevent the judgment from being pleaded in bar to another action between the same parties, it is held that if, after a judgment has been successfully pleaded in the second suit, it is reversed on appeal, the judgment in the second action

may be set aside by the trial court for that reason, although no error was committed on the trial. *Parkhurst vs. Berdell,* 110 N. Y. 386, 392; 18 N. E. 123."

The court then proceeds to discuss certain other authorities and the reasons upon which the conclusions reached therein were based. The opinion concludes:

"In view of what has been said, we conclude that we have the power and that it is our duty to reverse the judgment below, and remand the cause for a new trial. The judgment in the mandamus case has been reversed, and the cause remanded for a new trial, and, if this court makes a similar order, it will be optional with the plaintiff to prosecute either one of the suits and dismiss the other, and by so doing avoid further complications growing out of the pendency of suits upon the same cause of action in two courts of co-ordinate jurisdiction."

The foregoing principles also find support in *Ridge vs. Manker,* 132 Fed. 599, 607.

2 Freeman on Judgments, 5th Ed., 721.

We have been able to find no federal authority in conflict with the doctrine announced in the foregoing cases and we think the matters and things hereinbefore set forth are sufficient to entitle us to a reversal of the judgment appealed from. We may

add that we are filing with this petition a certified copy of the order entering the mandate of the Supreme Court in the above case.

Respectfully submitted,

McCamant & Thompson,

Attorneys for Appellant.

EXHIBIT "A"

In the Supreme Court of the State of Oregon

Department No. 2

BERTHA E. LIPP,
Respondent,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation,
Appellant.

Appeal from Coos County.
Hon. George F. Skipworth, Judge.
Argued and Submitted April 17, 1928.

Wm. T. Stoll (J. W. McInturff on Brief) for Respondent.

Wallace McCamant (McCamant & Thompson and Ralph H. King on Brief) for Appellant.

BELT, J.

Reversed and Remanded.

Filed May 22, 1928,
ARTHUR S. BENSON, Clerk.
By.....
Deputy.

BELT, J.

Plaintiff had verdict and judgment in an action on an insurance policy issued by the defendant company on the life of her husband. The sole issue in the trial court was whether the insured was dead. It was the contention of the plaintiff that her husband had drowned in the Columbia River, near Vancouver, Washington, on or about January 31, 1924. The defendant claimed that he was a fugitive from justice. There was testimony tending to support both theories. No motion for nonsuit or directed verdict was made challenging the sufficiency of the evidence. The plaintiff established a prima facie case and it was proper to submit her case to the jury.

This action was commenced about three years after the disappearance of John A. Lipp, the husband of plaintiff. The plaintiff and her son and daughter testified at the trial as to the facts and circumstances surrounding the disappearance of the alleged deceased. Depositions of the father, mother and sister of plaintiff's husband were also introduced in evidence, tending to show that if Lipp were alive he would probably return to his family. On July 10, 1925, plaintiff instituted a suit for divorce against Lipp charging him with desertion. On April 22, 1926, however, the suit was dismissed when, as she says, she was convinced, on account of the discovery of a skull in the river, that her husband was dead.

Over the objection of defendant, plaintiff, in response to the question, "What is the reputation in the family of John A. Lipp as to whether he is dead or alive?" was permitted to answer, "They all think that he is dead." She was also asked, "Do you know what the general reputation in the community in which John A. Lipp resided is as to whether or not he is dead or alive?" and in response answered, "It is that he is dead." It is contended that the admission of this testimony constitutes reversible error. It is well established that the admission of evidence of reputation as applied to questions of pedigree, marriages, births and deaths is an exception to the general rule rejecting hearsay evidence. It is an exception founded upon necessity. When the death is of such recent occurrence that it is susceptible of proof by living witnesses, there is no occasion to resort to hearsay testimony. In the instant case, members of the Lipp family submitted to the jury for its consideration all of the facts and circumstances within their knowledge from which a reasonable inference of Lipp's death could be drawn. The testimony relative to reputation in the family and community amounted, under the circumstances as disclosed by the record, to a substitution of the judgment of a witness for that of a juror. The vital point in the case was whether Lipp was dead or alive. It was prejudicial error to permit a witness thus to invade the province of the jury In *re Hurlburt's Estate,* 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794; *Metropol-*

itan Life Insurance Company vs. Lyons, 50 Ind. Ap. 534, 98 N. E. 824; *Denbo vs. Boyd,* 194 Mo. Ap. 121, 185 S. W. 236; *Stein vs. Bowman,* 10 L. Ed. 129; *Fidelity Mutual Life Insurance Company vs. Mettler,* 185 U. S. 308, 46 L. Ed. 922.

Counsel for plaintiff urges that the testimony relative to reputation of death in the family and community was introduced not to establish the fact of death, but for the purpose of showing good faith of plaintiff and to refute the charge of fraud. In this connection it is significant to note that, at the time the questions were asked concerning reputation in the family and community, plaintiff's good faith had not been put in issue, as the record of the divorce proceeding was introduced subsequent thereto. Reliance is had on *Fidelity Mutual Life Insurance Company vs. Mettler, supra,* which holds such evidence to be admissible not to prove death but to refute a charge of fraud. In the Mettler case it was the contention of the insurance company that the insured and his sister had entered into a conspiracy to defraud the company. Here there is no such contention, the defense being that Lipp is alive and a fugitive from justice. After a diligent search of the authorities we have found no case based on a similar state of facts which holds such evidence to be admissible. It is idle to argue that it was not prejudicial. It was directed to the vital point in the case.

As stated in *Pitts et al. vs. Crane,* 114 Or. 593, 236 P. 475:

> "When prejudicial error affirmatively appears on the face of the record, this court cannot presume that it is harmless."

We see no merit in other assignments of error, but, for reasons stated, we are obliged to reverse the judgment in favor of plaintiff and remand the cause for a new trial.

Rand, C. J., and Bean, and Coshow, J. J., concur.

EXHIBIT "B"

In the Circuit Court of the State of Oregon

for Coos County

BERTHA E. LIPP, *Plaintiff,* vs. THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, *Defendant.*	ORDER

This cause coming on to be heard on the application of the defendant for an order entering the mandate of the Supreme Court in the above entitled cause and the said mandate being presented in connection with said application and being in words and figures as follows, to-wit:

"BE IT REMEMBERED, That at a regular term of the Supreme Court of the State of Oregon, begun and held at the Supreme Court room in the City of Salem, on the first Monday of March, 1928.

On this Tuesday, the 22nd day of May, 1928, the

same being the 33rd judicial day of said term, there were present:

JOHN L. RAND, Chief Justice,
GEORGE ROSSMAN, Associate Justice,
OLIVER P. COSHOW, Associate Justice,
HARRY H. BELT, Associate Justice,
THOMAS A. McBRIDE, Associate Justice,
HENRY J. BEAN, Associate Justice,
GEORGE M. BROWN, Associate Justice,
ARTHUR S. BENSON, Clerk,

whereupon, among others, the following proceedings were had:

BERTHA E. LIPP, *Respondent,* vs. THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, *Appellant.*	*Department No. 2* *Appeal from Coos County,*

This cause on April 17, 1928, having been duly argued and submitted upon and concerning all questions arising upon the transcript and record and then reserved for further consideration, and the Court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is error as alleged.

It is therefore considered, ordered and adjudged that the judgment of the Court below in this cause rendered and entered be and the same is reversed and set aside.

It is further ordered that appellant recover of and from respondent its costs and disbursements in this court taxed at $379.27.

It is further ordered that this cause be remanded to the court below from which the appeal was taken with directions to grant a new trial and to enter a judgment in accordance herewith."

It is considered, ordered and adjudged that the said mandate be spread upon the journal of this court, and thereupon it is

CONSIDERED, ORDERED AND ADJUDGED that the defendant do have and recover of plaintiff the defendant's costs and disbursements on appeal taxed at Three Hundred Seventy-nine and 27/100 Dollars ($379.27) and that execution do issue therefor.

(Sd.) J. T. BRAND, Judge.

Dated June 27, 1928.

CLERK'S CERTIFICATE

State of Oregon, }
County of Coos, } ss.

I, ROBT. R. WATSON, County Clerk of Coos County, Oregon, and Ex-Officio Clerk of the Circuit Court for said County and State, do hereby certify that the foregoing and attached copy of ORDER ON MANDATE, in the case of Bertha E. Lipp vs. The Mutual Life Insurance Company of New York, Case No. 7626, has been by me compared with the original Order, entered June 27, 1928, in Circuit Court Journal No. 22, page .., records of Coos County, Oregon, now on file and of record in my office and custody, and that it is a true, full and correct copy, and transcript therefrom and of the whole of such original Order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Circuit Court this 9th day of July, 1928.

(Sgd.) ROBERT R. WATSON, Clerk.

By.....

(SEAL) Deputy.

BRIEF

STATEMENT OF FACTS

The litigation had in the Circuit Court of the State of Oregon for Coos County and in the District Court of the United States for the District of Oregon is based upon the disappearance of John A. Lipp on or about the 31st of January, 1924. At that time John A. Lipp had been employed by Dr. Otis B. Wight and Mr. Alma D. Katz of Portland, Oregon, to work upon the Waucomah Farm, a property owned by Dr. Wight and Mr. Katz and situate four miles below Vancouver, Washington, on the bank of the Columbia River. On the 31st of January, 1924, Dr. Wight and Mr. Katz ascertained that Mr. Lipp had executed a chattel mortgage covering the personal property on this farm as security for his individual note given the Vancouver National Bank of Vancouver, Washington. They asked Lipp to come to Vancouver and explain this transaction. Lipp left the farm, met a friend of his, Harry G. Smith by name, at the edge of Vancouver and Smith at Lipp's request drove Lipp across the Interstate Bridge and left him in the Kenton District of Portland.

Appellant has been unable to account for Lipp's movements at any time since then. Bertha E. Lipp, who is his wife, and who is the beneficiary under two policies of life insurance in the appellant company, has brought these actions claiming that the insured is dead and that she is entitled to recover.

As is stated in the foregoing petition she sued first in the Circuit Court of the State of Oregon for Coos County on the smaller of the two policies. The amount involved in this action was less than $3000 and there was no right of removal. The verdict of the jury was in favor of plaintiff and judgment was entered thereon. This judgment was the sole basis of recovery in the action brought in the Federal Court. After the trial of this cause in the United States District Court, the Supreme Court of Oregon reversed the judgment rendered in the Circuit Court of the State of Oregon for Coos County.

ERRORS RELIED UPON

The errors relied upon by appellant are found on pages 45-48 of the record. They are three in number:

(1) That the court erred in receiving in evidence the record of the judgment rendered by the Circuit Court for Coos County.

(2) That the court erred in excluding our testimony tending to show that John A. Lipp is still living.

(3) That the court erred in giving the following instruction:

> "I will say, in the first instance, that as to the death of the deceased, that matter was formerly litigated between these parties, in an action commenced in Coos County, Oregon. In

that action there was an issue raised upon the question as to whether the deceased, Lipp, died on the 31st day of January, 1924. That issue was determined in favor of the plaintiff, and, so far as this case is concerned, it is conclusive upon the parties to this action. So you will assume that the deceased died on that date, as set forth in the complaint."

These three assignments of error are all based on a single legal contention made by appellant. It is well settled under the laws of Oregon that an estoppel must be pleaded if it is to be relied upon, provided there is opportunity to plead the estoppel.

Couch vs. Scandinavian Bank, 103 Or. 48, 56.

Vogt vs. Marshall-Wells Hardware Co., 88 Or. 458, 464.

Gladstone Lumber Co. vs. Kelly, 64 Or. 163, 166.

This principle of law has been applied specifically to cases where the estoppel relied upon is the judgment of a court of record.

Larson vs. Larson, 103 Or. 393-395.
McCully vs. Heaverene, 82 Or. 650, 653.
Davis vs. Chamberlain, 51 Or. 304, 315.
Bays vs. Trulson, 25 Or. 109, 112.
Murray vs. Murray, 6 Or. 26, 29.

The decision of *Farmers Bank vs. Davis,* 93 Or. 655, 664, is out of harmony with the foregoing line of authority and it is our contention that it does not correctly state the law in Oregon on the above question.

The complaint of appellee found in the transcript of record on pages 3-6 does not plead the estoppel of the Coos County judgment and it was our contention in the lower court that for this reason the judgment roll was inadmissible and that the court erred in receiving it, in excluding appellant's testimony tending to show that John A. Lipp is still living, and especially in giving the jury the binding instruction above quoted.

For this reason as well as for the reasons set forth in the petition printed with this brief, we ask that the above cause be reversed.

Respectfully submitted,

McCamant & Thompson,

Attorneys for Appellant.